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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

GOBIND NATH SHAHA CHOWDHURI, TRUSTEE TO THE ESTATE OF PARSHADANGA CHOWDHURI, (PLAINTIFF) *v.* G. M. REILY, (DEFENDANT.)*

1886 *February* 12.

Onus probandi—Landlord and tenant—Ejectment—Under-tenures—Sale for arrears of rent—Avoidance of under-tenures—Incumbrances—Rent law —Bengal Act VIII of 1869, *ss.* 59, 60, 66.

In a suit by the purchaser of an under-tenure, under ss. 59 and 60 of the Rent Act (Beng. Act VIII of 1869), to obtain possession of lands held by the defendant, on the ground that the holdings are incumbrances which have accrued thereon by an authorized act of the previous holder of the under-tenure, it lies upon the plaintiff to show that the defendant's holdings are such incumbrances as the plaintiff is entitled to avoid under s. 66 of the Rent Act.

IN this case the material portion of the judgment appealed from is as follows:—

"These were suits by the purchaser of a putni and dur-putni to avoid under-tenures under the provisions of s. 66 of the Rent Law. The main point for decision is, if plaintiff is bound to prove that the under-tenures were created by the putnidar or dur-putnidar? I think it is clear that the plaintiff must show

* Appeals from Appellate-Decrees Nos. 784, 796 of 1885, against the decrees of H. Beveridge, Esq., Judge of Furridpore, dated the 2nd of February 1885, affirming the decrees of Baboo Durga Charan Ghose, Munsiff of Furridpore, dated 26th of January 1884.

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that his case comes under the section, and that, therefore, he must show that the under-tenures alleged to be incumbrances are really such, that is, that the putnidar, &c., made them. He has not shown this, even in a *primâ facie* manner, and therefore it follows that the Munsiff was right in dismissing the suits."

The plaintiff appealed to the High Court.

Mr. *Bell* (Baboo *Kishori Lal Sarkar* with him) for the appellant, contended that the *onus* was wrongly placed on the plaintiff, the matters to be proved being peculiarly within the knowledge of the defendant.

Baboo *Kashi Kant Sen* and Baboo *Basant Coomar Bose* for the respondent.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

On the first point raised in second appeal, that is regarding the nature of these suits, we agree with the District Judge. They are on behalf of the purchaser of an under-tenure under ss. 59, 60 of the Rent Act, to obtain possession of lands held by the defendant, on the ground that the holdings were incumbrances which have accrued thereon by an authorized act of a previous holder of that under-tenure. The plaintiff's case is not, as now contended before us, that the defendants were trespassers without any title, but that the title under which they held was voidable by the auction sale, and the object of the suits is to enforce the rights obtained by that sale.

It therefore becomes necessary to determine the next and main objection raised, that the burden of proof lies on the defendants to prove their title to remain on the lands.

It seems to us that a purchaser of an under-tenure who seeks to enforce his rights under s. 66 of the Rent Act is bound to show that the person whom he seeks to eject holds under an incumbrance of the nature therein specified—an incumbrance that he is entitled to avoid. The law does not provide that he shall obtain the under-tenure free of all incumbrances, but only "of incumbrances which may have accrued thereon by any holder of the said under-tenure," without special authority from his landlord. Consequently the plaintiff must start his case by showing that the title of the defendant so accrued.

The only case quoted to us which is exactly in point is the case of *Durga Prasanna Ghose* v. *Kali Das Dutt* (1). The same point was raised in that case, and the opinion expressed is that which we now entertain. The other case quoted, namely *Batai Ahir* v. *Bhuggobutty Koer* (2), and the two cases *Ram Monee Mohurer* v. *Aleemoodeen* (3) and *Raj Kishen Mookerjee* v. *Pearee Mohun Mookerjee* (4) cited therein, and followed by that decision, proceed on entirely different grounds. The plaintiffs in these cases were admittedly proprietors of the lands and, as such, were entitled to exercise all the ordinary rights of ownership; and it was held in all these cases that the defendants who disputed the landlord's right to collect rents from the tenants directly, on the ground that they held intermediately, were bound to establish their title. As the plaintiff has failed to prove that the defendant holds under an incumbrance voidable under s. 66 of the Rent Act, the suits have been properly dismissed. We accordingly dismiss these appeals with costs.

P. O'K. *Appeals dismissed.*

Before Mr. Justice Field and Mr. Justice Macpherson.

KALI KISHEN TAGORE (PLAINTIFF) *v.* GOLAM ALI (DEFENDANT.)*

1886 *March* 19.

Landlord and tenant—Notice to quit—Declaratory decree—Specific Relief Act—Transfer of Property Act (IV of 1882), *s.* 42*—Discretion of Court to give a declaratory decree—Tenant setting up larger interest than he is entitled to.*

A plaintiff, admitting a defendant's right to a *kursa-jama* tenure in certain lands, but denying a permanent *malguzari* tenure set up by him, sought to eject the defendant from the *kursa-jama* holding, and for a declaration that the defendant was not entitled to the permanent *malguzari* tenure: *Held*, that the plaintiff was entitled to the declaration asked for, notwithstanding that in consequence of his failure to prove a reasonable notice to quit, he was unable to obtain a decree for ejectment.

A Judge, interfering with the discretion exercised by a lower Court in granting a declaratory decree, should state his reasons for so doing.

The principle laid down in *Vivian v. Moat* (5) is not applicable to this country.

* Appeal from Appellate Decree No. 329 of 1885, against the decree of H. Beveridge, Esq., Judge of Furridpore, dated the 19th of December 1884, reversing the decree of Baboo Jagat Durlubh Mozoomdar, Subordinate Judge of Furridpore, dated the 22nd of December 1883.

(1) 9 C. L. R., 449.
(2) 11 C. L. R., 476.
(3) 20 W. R., 374.
(4) 20 W. R., 421.
(5) L. R. 16 Ch. D., 730.